RAMLI ZAKARIA & ORS.

v.

THE GOVERNMENT OF MALAYSIA

HIGH COURT MALAYA, KOTA BHARU
MOHD. ZAHIR ISMAIL J
[CIVIL APPEAL NO. 182 OF 1981]
6 JUNE & 12 AUGUST 1982

CONTRACT: *Vocational school teachers - Training course - Offer letter to employ under Unified Teachers Scheme (UTS) - Whether offer letter part of agreement - UTS suspended upon completion of course - Effect - Frustration - Employment under Aziz scheme - Scale lower than UTS - Rule 103 Service Circular No.10/71 - Right to opt - Whether any anomaly - Salaries tribunal.*

The plaintiffs who are Vocational School Teachers pursuant to a contract dated 1 May 1969 with the defendant went through a course of teacher training. Prior to the execution of the agreement was a letter from the defendant offering the plaintiffs employment after completion of the course under the Unified Teachers Scheme (UTS). By the time the plaintiffs completed their course the UTS had been suspended and the plaintiffs were employed under the Aziz Scale.

The plaintiffs claim for a declaration that they should have been paid under the UTS in accordance with the agreement. The defendant resisted the claim on the grounds that:

(i) the agreement was only to provide a course of teacher training and not employment;

(ii) the offer letter was not part of the agreement;

(iii) as recruitment of teachers under UTS had been discontinued, the offer to employ them under it had been frustrated.

What the plaintiffs wanted was first to be placed under UTS and then opt into Aziz Scheme. The issue was whether the plaintiffs were entitled to be placed under the UTS.

Held:

[1] The defendant's contention that the agreement was merely for training and not for employment is unsustainable. It was an agreement to provide both. Although under the terms of agreement the defendant was not obliged to employ the plaintiffs, if however the defendant employs the plaintiffs then it would have to be upon the terms and conditions for the time being applicable to the post.

[2] The letter of offer to employ the plaintiffs under the UTS was part of the agreement. As at the time of the execution of the agreement the UTS was still in existence and the consensus *ad idem* of both the parties as regards salary scales were the UTS, the defendant cannot ordinarily on his or their own volition alter the scale to one of a different character as was agreed before. Further the offer letter was not inconsistent with the agreement.

[3] The contract between the parties has however been frustrated. The defendant like any other could not legally place the plaintiffs under the UTS as to do this would be illegal. As the defendant cannot within the law employ the plaintiffs under the UTS the contract was discharged.

[4] The plaintiffs' claim to be first placed under UTS and them opt into Aziz could not succeed. Under rule 103 of the Service Circular No. 10/71 the right to opt was given only to those who were employed before the coming into force of the scheme.

[5] However, as there appears to be some anomaly as far as the position of the salaries of the plaintiffs is concerned which they cannot obtain redress under the Court of Law, most probably the Salaries Tribunal is the proper venue to deal in this matter.

[Plaintiffs' claim dismissed with costs.]

Cases referred to:
C.B. Reilly v. The King [1934] AC 176
Thambipillai v. Government of Malaysia [1969] 2 MLJ 206

Legislation referred to:
Evidence Act 1950, s. 92
Federal Constitution, art. 132(2)

Other sources referred to:
The Law of Contract in Malaysia and Singapore - Cases and Commentary by Visu Sindnadurai at p. 487/8
Chitty on Contracts - General Principles, 24th Edn., pp. 658/9, 659/60

For the plaintiffs - A. Gomez; A Gomez & Co.
For the defendant - Dato Haji Abu Mansor bin Ali, SFC

JUDGMENT

Mohd. Zahir Ismail J:

The plaintiffs, some 86 Vocational School Teachers, are claiming against the defendant for a declaration that they should have been paid salaries and allowances in accordance with the scales for Unified Teachers Scheme (UTS) as it existed on 1 May 1969, under an agreement between the parties dated 1 May 1969 (AB5-8).

The plaintiffs also plead that accompanying this agreement before it was signed there was a letter of offer (AB1, 2 & 3) to every plaintiff and under para. 3(b) of this letter of offer there was the alleged undertaking by the defendant to employ the plaintiffs under UTS.

The plaintiffs further plead that upon successful completion of their course they were employed under the Aziz Scale with a starting salary of RM230, lower than UTS which was RM310 for men and RM275 for women. Eventually under letter Perlantikan Kejawatan Sementara dated 21 September 1972 (AB27-28), the defendant offered the plaintiffs a new scale with a starting salary of RM370 which is still lower than that if they were first placed under UTS and then opted into Aziz Scales.

In his written submission the plaintiffs' Counsel stated that after two years of training the plaintiffs were asked to do an extra year of special training. Others in the same batch who were employed straight away after the two year course were put under UTS and who, after coming into force the Aziz Scale, opted into this new scale with a salary of RM460, higher than the salary of the plaintiffs who passed out after an extra year of specialist qualification. They were further categorised as T2 teachers instead of T3 as their colleagues. The plaintiffs petitioned before bringing this suit to the defendant (AB22). The defendant's reply (AB25) was merely that the appointment of officers in the Education service from the date of Circular No. 10/71 was in accordance with that circular and refused to consider the petition favourably.

The defendant whilst admitting the letter of offer to the extent of conceding that para. 3(b) of the letter of offer was intended to refer to UTS, pleaded that the agreement (AB5-8) cannot be read subject to the letter of offer.

The defendant further pleaded that as recruitment of teachers into UTS had been discontinued as from 15 December 1971, the offer to employ them under the UTS has become frustrated.

The defendant further pleaded that as on 1 April 1972, the plaintiffs were placed on attachment as they had not successfully completed their course of training and consequently each of them was paid attachment allowance of RM230 per month and further pleaded that the plaintiffs having completed their course on 1 June 1972, accepted the defendant's offer of employment as temporary teachers without reservation and were paid salaries in accordance with the terms and conditions of their employment in compliance with Service Circular No. 10/1971. However, the defendant did not plead waiver or estoppel.

The defence also pleaded that the agreement was not an employment agreement but that of awarding a course of teacher training with the sole obligation of the defendant that the plaintiffs be given proper training.

There was no evidence taken since almost all the material facts were agreed upon in AB or before me on the date of hearing. It was further agreed that the question of arrears of salaries payable by the defendant to the plaintiffs should the plaintiffs succeed in this suit would be calculated by the defendant in the normal manner. This has saved a lot of time of the Court and the parties. It is further agreed that the issue be narrowed down to whether the plaintiffs are entitled to be placed under the UTS.

The defendant's contention that the agreement (AB5-8) is merely for training and not for employment is, in my opinion, unsustainable. I am of the opinion it is an agreement to provide for both. Paragraph 1(c) of the said agreement reads as follows:

> that the student will if required to do so by the Government at any time within twelve calendar months of the completion of the course serve the Government as a teacher in any post consistent with the qualifications obtained by the student to which the student may be appointed for a period of five years from the date of the completion of the course upon the terms and conditions for the time being applicable to such post and at a salary in accordance with the scales of salaries for the time being in force relating thereto.

It is clear that the defendant might not be obliged to employ the plaintiff because of the words: "that the student will if required to do so..." But if the defendant were to employ the plaintiffs then it would have to be upon the terms and conditions for the time being applicable to the post. If any of the plaintiffs refused to serve, he and/or his sureties are liable to be sued for damages. The discretion with the defendant is not to employ.

As regards whether the letter of offer (AB1-3) formed part of the agreement or not, the defendant admits that in the letter of offer, the scale intended is the UTS. At the time of signing the agreement (1 May 1969) the UTS scale was still in existence. The Aziz Scale came into force *vide* Circular No. 10/71 dated 15 December 1971. Thus at the time of execution of the contract the *consensus ad idem* of both parties as regards the salary scales were the UTS. The question is this: can the defendant on their own volition alter the scale to one of different character than what was agreed before. Ordinarily, I do not think a party can do so. This is not the question of s. 92 of the Evidence Act which is the exclusion of evidence of oral agreement. The letter of offer is a written document and it is not inconsistent with the Agreement at the time of signing. The UTS is still in existence although suspended.

However, in the instant case, where a Government is concerned there is substance in the defendant's plea that the contract cannot be fulfilled on account of frustration. The UTS upon coming into force of the Aziz Scheme has been suspended and from the date of Circular No. 10 of 1971 (15 December 1971) which embodied the Aziz Scheme, it is stipulated under Clause 2 that teachers will only be recruited to the Education Service under the Scheme. This Aziz Scheme was adopted by the Government and gazetted as a result of the Aziz Commission Report. The Commission was appointed by the Yang di-Pertuan Agong under the Commissions of Enquiry Act 1950, and gazetted in PU(B) 41 dated 27 January 1970, with the terms of reference generally to review the teachers' salary. The Commission having completed their enquiry submitted their report and which was accepted by the Government in the form of Service Circular No. 10/1971 aforesaid. I am of the opinion that the contract between the parties has been frustrated. The defendant, like any other, cannot now legally place the plaintiffs under UTS. To do so would be illegal. In *C.B. Reilly v. The King* [1934] AC 176, one Reilly was appointed to be a member of the Federal Appeal Board for a term of years. On 30 May 1930 the Canadian Legislature passed an Act to amend the Pension Act and Reilly's office was abolished. His action for damages for breach of contract was dismissed and it was held that "... if further performance of a contract becomes impossible by legislation having that effect the contract is discharged."

Thus, in the instant case, the defendant cannot within the law employ the plaintiffs under the UTS. So the contract is discharged.

The plaintiffs' Counsel submitted that Circular 10/1971 did not apply to the plaintiffs who were then not yet Government servants. He quoted *Thambipillai v. The Government of Malaysia* [1969] 2 MLJ 206 where it was held that a Circular Letter No. 6/1961 which was a mere expression of policy to raise the pension to 60 years was not binding on the Government. However, in the instant case it appears that Service Circular No. 10/1971 is promulgated under Article 132(2) of the Federal Constitution which reads as follows:

> (2) Except as otherwise expressly provided by this Constitution, the qualifications for appointment and conditions of service of persons in the public services other than those mentioned in para. (g) of Clause (1) may be regulated by federal law, by the Yang di Pertuan Agong ...

Thus, it would appear that such conditions of appointment and conditions of service as embodied in the Service Circular No. 10/1971 have the force of law under which the Government may sue and be sued. This being the case, the plea of frustration of contract should prevail. The defendant cannot at the risk of acting illegally be in the position to engage the plaintiffs on other schemes except under the Aziz Scheme.

There is another aspect of looking into the whole matter. Supposing we consider that defendant is bound to pay the plaintiffs under the contract the UTS, then the defendant would have to pay them the initial salary of RM310 for men and RM275 for women. But they had been paid under the Aziz Scheme a higher salary of RM370 for both men and women. They became under the Aziz Scheme, Government servants with pension rights instead of formerly as supposed employees of the various School Boards which was rather illogical.

What the plaintiffs want is first to be placed under UTS and then opt into Aziz Scheme. But under r. 103 of the Salary Circular No. 10/1971 the right to opt was given only to those who were employed before the coming into force, of the Scheme. Those who were recruited under

the Scheme are not in the position to opt as they are already in it. Further the right to opt is never envisaged in the agreement between the parties. They cannot reject the Aziz Scheme and apply for right of option under it at the same time.

I must admit there appears to be some anomaly as far as the position of the salaries of the plaintiffs. But I think they cannot obtain redress from the Court of law and most probably the Salaries Tribunal is the proper venue to deal in this matter.

In the circumstances, I dismiss the plaintiffs' claim with costs.

Also found at [1982] CLJ 158